91-540

NO. _____

Supreme Court, U.S.
FILED
SEP 27 1991
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1991

THOMAS JAMES CHANCE,

Petitioner,

v.

THE STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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QUESTION PRESENTED

1. Did the South Carolina Supreme Court err in holding that *Baldasar v. Illinois*, 446 U.S. 222 (1980) allowed a prior guilty plea, at which the petitioner was not represented by counsel and did he waive his right to counsel, to be used to require the trial judge to enhance the punishment for the petitioner for his present conviction of driving under the influence?

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption.

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IN THE SUPREME COURT
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THE STATE OF SOUTH CAROLINA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

Petitioner, Thomas James Chance, respectfully prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of South Carolina entered on April 8, 1991.

OPINION BELOW

The decision of the Supreme Court of the State of South Carolina is reported at 405 S.E.2d 375 (S.C. 1991) and is

reprinted at Appendix A at page 1. The Order denying a rehearing is reprinted at Appendix B at page 5.

JURISDICTION

The judgement of the Supreme Court of the State of South Carolina was entered on April 8, 1991 and a timely petition for rehearing was denied on July 3, 1991. The jurisdiction of this Court arises under 28 U.S.C. §1257(a).

STATUTE INVOLVED

The driving under the influence statute for the State of South Carolina is found in South Carolina Code of Laws §56-5-2930 *et. seq.* The specific provision involved in this case is §56-5-2940(2) and reads as follows:

> (2) By a fine of not less than two thousand dollars nor more than five thousand dollars and imprisonment for not less than forty-eight hours nor more than one year for the second offense. However, the fine imposed by this item may not be suspended in an amount less than one thousand dollars. In lieu of service of imprisonment the court may require that the individual complete an appropriate term of public service employment of not less than ten days upon terms and conditions the court considers proper.

STATEMENT OF THE CASE

The petitioner was arrested on June 18, 1989 and charged with driving under the influence. He had a prior offense

tried in the court of the magistrate on March 29, 1980.[1] The petitioner did not contest the fact that he was guilty of driving under the influence on June 18, 1989. His sole point of contention was that his offense should have been treated as a first offense because he was unrepresented by counsel at his prior conviction and he did not knowingly and intelligently waive his right to counsel. The state and the defendant stipulated at trial that the defendant did not have an attorney at the prior trial nor did he waive his right to counsel. (Tr. at 13). This finding was accepted by the South Carolina Supreme Court. *State v. Chance*, 405 S.E. at 375, (Appendix at 2)

The South Carolina Supreme Court, in a divided opinion, affirmed the conviction of the petitioner for a second offense driving under the influence by holding that *Baldasar v. Illinois*, 446 U.S. 222 (1980) does not apply if the "defendant was not actually incarcerated for a prior uncounselled misdemeanor . . . ." *State v. Chance*, 405 S.E.2d at 376. (Appendix at 3)

The petitioner raised the issue of the constitutionality of using a prior uncounselled guilty plea to enhance his punish-

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[1] Under South Carolina law, a defendant charged with driving under the influence first offense is entitled to a jury trial.

ment on page 11 of the transcript of record. That portion of the transcript is reprinted at Appendix C at page 7.

REASONS FOR GRANTING THE WRIT

A. **The use of a prior uncounselled guilty plea to require a trial judge to enhance the present sentence of the petitioner violates the right of the petitioner to effective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States.**

Since this Court decided *Baldasar v. Illinois*, 446 U.S. 222 (1980), state courts have varied their interpretation of the decision. Some states have interpreted it to mean that no prior uncounselled guilty plea can be used to enhance the punishment of a defendant. *See, e.g., Lovell v. State*, 283 Ark. 425, 678 S.W.2d 318 (1984); *State v. Laurick*, 120 N.J. 1, 575 A.2d 1340 (1990); *State v. Vares*, 801 P.2d 555 (Haw. 1990); *State v. Oehm*, 9 Kan. App. 2d 399, 680 P.2d 309 (1984); State v. Dowd, 478 A.2d 671 (Me. 1984); *State v. Wiggins*, 399 So.2d 206 (La. 181);[2] *People v. Stratton*, 148 Mich.App. 70, 384 N.W.2d 83 (1986); *State v. Nordstrom*, 331 N.W.2d 901 (Minn. 1983); *State v. Ulibarri*, 96

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[2] The Louisiana Supreme Court anticipated the decision of this Court in *Baldasar* when it decided *City of Monroe v. Fincher*, 305 So.2d 108 (La. 1974).

N.M.2d 511, 632 P.2d 746 (1981); *City of Pendleton v. Standefer*, 297 Or. 725, 688 P.2d 68 (1984); *Sargent v. Commonwealth*, 5 Va. App. 143, 360 S.E.2d 895 (1987); *State v. Armstrong*, 332 S.E.2d 837 (W. Va. 1985).

Other states have allowed the use of a prior uncounselled guilty plea to enhance punishment, but the reasons for the decisions are almost as numerous as the decisions. *See, e.g. State v. Chance*, 405 S.E.2d 375 (S.C. 1991)(prior plea may be used if defendant was not incarcerated at prior plea); *State v. Orr*, 375 N.W.2d 171 (N.D. 1985);[3] *Hlad v. State*, 762 S.2d 762 (Fla. 5th DCA 1990)(prior uncounselled plea can be used unless prior offense subjected defendant to more than six months imprisonment); *Schindler v. Clerk of Circuit Court*, 715 F.2d 341 (7th Cir. 1983); *Moore v. Jarvis*, 885 F.2d 1565 (11th Cir. 1989)(prior plea can be used unless defendant was indigent or misconduct of the state caused counsel to be unavailable to defendant); *Sheffield v. City of Pass Christian*, 556 So.2d 1052 (Miss. 1990)(*Baldasar* does not establish a rule); *Moore v. State*, 181 Ga. App. 548, 352 S.E.2d 821 (1987)(*Baldasar* applies only

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[3] The North Dakota Supreme Court while limiting the application of *Baldasar*, held that a prior uncounselled guilty plea violated the North Dakota state constitution.

if prior uncounselled plea is used to enhance subsequent conviction to a felony); Commonwealth v. Thomas, 510 Pa. 106, *507 A.2d 57 (1986); State v. Novak*, 107 Wis.2d 31, 318 N.W. 364 (1982).

The decisions of the District Courts of Appeals of Florida illustrate the confusion. For example, the Fifth District in *Hlad v. State*, 565 So. 2d 762 (Fla. 5th DCA 1990) has held that *Baldasar* does not apply because the defendant was not subjected to a term of imprisonment of more than six months. The First District in *Harrell v. State*, 469 So.2d 169 (Fla. 1st DCA 1990) held that *Baldasar* does prohibit the use of an uncounselled guilty plea even if the defendant was subjected to less than six months imprisonment.

In *People v. Stratton*, 148 Mich. App. 70, 384 N.W.2d 83 (1985) the Michigan Court of Appeals said "[a]s the case law now stands, two conclusions are obvious: first, the Supreme Court has not provided a definitive answer to the question presented in *Baldasar* and, second the lower federal courts have not come to agreement on the rationale to follow in cases since *Baldasar*. Given this state of the federal law, our state courts may 'feel free to choose the view which seems most appropriate

to us.'" *Id.* at 78, 384 N.W.2d at 87.

The South Carolina Supreme Court erred in holding that the prior uncounselled guilty plea can be used to enhance the punishment in a subsequent case. In so holding, the South Carolina Supreme Court ruled, "we hold when a defendant is not actually incarcerated for a prior uncounselled misdemeanor, that offense may be used for enhancement." *State v. Chance*, 405 S.E.2d at 376 (Appendix at 3). The validity of a prior plea should not depend on post plea events. If Thomas Chance had been sentenced to just one day in jail at his prior plea, then, according to the South Carolina Supreme Court, the prior plea would not have been valid for enhancement purposes. Such a rule is illogical.

The state has made the choice to use prior convictions to require a trial judge to punish this and other defendants more severely for second and subsequent offenses. The state, as well as the defendant, should have a common desire to assure that a second and subsequent offender is in fact such an offender. Requiring that the state show that a defendant either had an attorney at the prior sentencing or that he waived his right to an attorney will not always assure that the defendant was properly

convicted, but will increase the probability that the conviction was in fact proper. The criminal justice system cannot achieve perfection. It can, however, be required to strive toward that goal.

Cases which are handled in magistrate's court without an attorney frequently result in a plea not because the defendant is guilty, but because a plea appears to the defendant to be the cheapest or easiest thing for the defendant to do at the time. A defendant, without consulting an attorney, cannot be assumed to know whether his constitutional rights were protected, he has a valid defense, or whether all evidence would be admissible. To assume otherwise is to assume all the public is as knowledgeable of the law as attorneys. While hindsight might prove it was not the cheapest or easiest thing to do, the fact remains that the plea is a fait accompli.

The importance of the constitutional guarantee of an attorney to assist a defendant at trial is to assure that the trial does not result in an erroneous conviction. That was the basic holding of this Court in *Gideon v. Wainwright*, 372 U.S. 335

(1963).[4] As this Court has said, a defendant "needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it." *Argersinger v. Hamlin*, 407 U.S. 25, 33 (1982). The test is not whether a plea is valid for some purposes but not for others. The test is whether a conviction which resulted from the defendant not having counsel and not waiving that right is sufficiently reliable to be used to enhance the punishment of the defendant for second and subsequent offenses. The burden upon the state is minimal if the state knows that before a conviction can be used to require a trial judge to enhance a punishment, the state must provide the accused with counsel or obtain a waiver of that right.

The State of South Carolina, if it desired, could have set the maximum punishment for a first offense of driving under the influence at five years imprisonment.[5] Under such a sentenc-

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[4] The *Gideon* case itself is probably the best example of why each defendant should have an attorney. At his trial, with the assistance of counsel, Clarence Gideon was found not guilty.

[5] Under South Carolina law, the maximum punishment for a fourth or subsequent offense for driving under the influence is five years imprisonment. *See*, S. C. Code (1976) § 56-5-2940(4).

ing scheme, a trial judge would be free to accept or reject, in his discretion, the use of any prior conviction. If the defendant could convince the trial judge that he did not have an attorney at a prior trial or plea, the trial judge would be free to treat him as a first offender.[6] Under the present sentencing structure, the trial judge is required by law to increase the sentence with each subsequent conviction. Thus, the state should bear the obligation of proving, at a minimum, that any prior plea or conviction was obtained with the assistance of counsel or that such right was properly waived.

The burden on the state of proving the defendant either had an attorney or waived his right to counsel is minimal. All that would be required is for the state to provide a form for the defendant to sign naming his attorney or having the defendant sign a waiver of his right to counsel. *See*, *Sargent v. Commonwealth*, 5 Va. App. 143, 360 S.E.2d 895 (1987). The retention of such a simple record would not place too great a burden upon the state in exchange for the right to enhance the punishment for second and subsequent offense.

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[6] Such a punishment would also assure that each defendant would have an attorney and that each subsequent conviction could be used to enhance the punishment of the defendant.

CONCLUSION

This Court should grant the Writ of Certiorari to eliminate the conflict and confusion among the various states as to the correct meaning and application of *Baldasar v. Illinois*, 446 U.S. 222 (1980). Without a definitive ruling from this Court this confusion will get worse. The right to counsel under the Sixth Amendment to the United States Constitution and the right to due process of law under the Fourteenth Amendment to the United States Constitution cannot be allowed to mean different things depending upon in which state a person is arrested.

Respectfully submitted,

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APPENDIX
PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF SOUTH CAROLINA

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APPENDIX A

THE STATE OF SOUTH CAROLINA
In The Supreme Court

The State, Respondent,

Thomas James Chance, Appellant.

Appeal from Greenwood County
Sidney T. Floyd, Judge

Opinion No. 23376

Heard February 6, 1991 - Filed April 8, 1991

AFFIRMED

C. Rauch Wise, of Wise & Tunstall, of Greenwood for Appellant.

Attorney General T. Travis Medlock and Assistant Attorney General Harold M. Coombs, Jr., both of Columbia, and Solicitor W. Townes Jones, of Greenwood, for Respondent.

GREGORY, C.J.: Appellant was convicted of second offense driving under the influence (DUI). He was sentenced to a one year term of imprisonment and fined $2,000, suspended upon the service of two days, payment of $1,000, and probation for one year. We affirm.

Appellant pleaded guilty in 1980 to a prior DUI. This offense is within the ten-year period allowed for enhancement to

second offense DUI under S.C. Code Ann. § 56-5-2940 (Supp. 1990). Appellant was not represented by counsel at the 1980 plea nor does the record before us indicate appellant waived his right to counsel. Appellant was no incarcerated for the 1980 offense.[1]

Appellant relies on *Baldasar v. Illinois*, 446 U.S. 222, 100 S.Ct 1585, 64 L.Ed.2d 169 (1980), to argue that his prior uncounselled guilty plea cannot be used to enhance his punishment as a repeat offender absent the State's proof of a waiver of counsel. Thus, for the first time, this Court must fact the difficult task of interpreting the *Baldasar* decision.[2]

Baldasar was decided after the decision in *Scott v. Illinois*, 440 U.S. 367, 99 S.Ct. 1158, 59 L.E.2d 383 (1979). *Scott* held that an uncounselled misdemeanor conviction is constitutionally valid if the offender is not actually incarcerated. The *Baldasar* court grappled with the issue whether a conviction valid under *Scott* may be used to increase the term of imprisonment for a subsequent offense under an enhanced penalty statute; the issue, however, was never resolved. The Court split four-to-four on this question and the fifty and deciding vote was cast on a different ground.[3]

Not surprisingly, state court decisions seeking to apply *Baldasar* have taken widely divergent views with no majority consensus. See e.g., *Commonwealth v. Thomas*, 510 Pa. 106, 507 A.2d 57 (1986) (valid for enhancement if no actual imprisonment and not subject to imprisonment for more than six months); *State v. Novak*, 107 Wisc. 31, 318 N.W.2d 364 (1982) (valid for

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[1] The statute in effect at the time allowed for punishment by a fine of fifty to one hundred dollars or imprisonment for ten to thirty days for first offense DUI. *S.C. Code Ann.* § 56-5-2940 (1976).

[2] In *State v. Canady*, ____S.C.____, 391 S.E.2d 248 (1990), we addressed a *Baldasar* claim but found it inapplicable because there was no enhanced punishment as a result of the prior conviction.

[3] Justice Blackmun concurred in reversal because he would find a right to counsel where the defendant is subject to imprisonment for six months or more. This test for right to counsel was rejected in *Scott*.

enhancement if not subject to imprisonment); *Sargent v. Commonwealth*, 5 Va.App. 143, 360 S.E.2d 895 (1987) (not valid for enhancement even if no actual imprisonment); *State v. Orr*, 375 N.W.2d 171 (N.D. 1985) (valid for enhancement if not punishable by imprisonment for more than six months.)

In seeking a logical application of the decisions of the United States Supreme Court, we conclude an uncounselled conviction constitutionally valid under *Scott* is valid for all purposes and therefore may be used to increase the term of imprisonment for a subsequent offense under an enhanced penalty statute. Accordingly, we hold when a defendant was not actually incarcerated for a prior uncounselled misdemeanor, that offense may be used for enhancement. The judgement of the circuit court is therefore.

AFFIRMED.

HARWELL, CHANDLER and TOAL, JJ., concurs. FINNEY, A.J., dissenting in separate opinion.

D I S S E N T

FINNEY, A.J.: I respectfully dissent. I would hold that a prior uncounselled conviction which did not result in incarceration may not be used to increase punishment under an enhanced penalty statute.

In affirming the circuit court, the majority concludes that an uncounselled conviction constitutionally valid under *Scott v. Illinois*, 440 U.S. 367 (1979), is valid for all purposes.

The United States Supreme Court held in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), that unless an accused has the guiding hand of counsel at every step in the proceedings against him, his conviction is no sufficiently reliable to support the severe sanction of imprisonment. Subsequently in *Scott*, supra, the Supreme Court held that counsel must be provided if a

prison term is actually imposed, not merely authorized. *Baldasar v. Illinois*, 446 U.S. 222 (1980), decided after *Scott*, supra, held that an uncounselled misdemeanor conviction is constitutionally valid if the offender in not actually incarcerated. The five justices is *Baldasar*, concurred, for differing reasons, that such a conviction may not be used to convert a subsequent misdemeanor into a felony with an enhanced prison term.

Apparently, the underlying consideration in these rulings is whether or not the accused would suffer an actual deprivation of personal freedom. In each instance, the uncounselled misdemeanor conviction was found to be constitutionally valid when no period of actual incarceration resulted therefrom. Hence, I would conclude that such a conviction may not form the basis for any subsequent incarceration.

"An uncounselled conviction does not become more reliable merely because the accused has been validly convicted for a subsequent offense. For this reason, a conviction which is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." *Baldasar*, 404 U.S. at 228 (Marshall, J. concurring).

In my opinion, an uncounselled first offense DUI guilty plea, which did not result in imprisonment, should not be used to convert a subsequent DUI conviction to a second offense DUI for the purpose of enhance punishment resulting in incarceration. I would reverse.

APPENDIX B

C. Rauch Wise, Esquire
408 Main Street
Greenwood, S.C. 29646

Re: The State v. Thomas James Chance

Dear Mr. Wise:

The court has refused your Petition for Rehearing in the above case in the following order:

"Petition for Rehearing
denied.

s/ George T. Gregory, Jr. C.J.
s/ David W. Harwell A.J.
s/ A. Lee Chandler A.J.
s. Jean H. Toal A.J.

"Petition for Rehearing
granted.

s/ Ernest A. Finney, Jr. C.J.

July 3, 1991."

The remittitur in this matter is today being forwarded to the Clerk of Court for Greenwood County.

Sincerely yours,

CLERK

CND,Jr./dmh

cc: The Honorable Harold M. Coombs, Jr.

Mr. Wise: And then we have the other question, the *Baldesar(sic) v. Illinois* question, which is the prior uncounselled DUI conviction which we contend cannot be used to enhance the punishment for this.

The Court: How about that?

Mr. Jones: Judge, It's a U. S. Supreme Court case, not a South Carolina Supreme Court.

Mr. Wise: Right. That gives me more ammunition, not less.

Mr. Jones: The point I'd like to make, judge, is that I'd like for them to give us a little bit more in the way of facts. I just don't have the records on his first offense. He says he didn't forfeit bond but rather was there.

Did he plead guilty, or did he contest it?

Mr. Wise: If you want him to testify, he will testify that he pled guilty, did not contest it, did not have a lawyer, and did not have the advice of a lawyer prior to the guilty plea.

(2)

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a constitutionally valid uncounseled misdemeanor that was adjudicated in magistrate's court be considered a prior offense for the purpose of sentencing the recidivist offender?

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RESPONDENT'S BRIEF IN OPPOSITION

The Respondent State of South Carolina respectfully requests that the Court deny the petition for a writ of certiorari, seeking review of the Supreme Court of South Carolina's opinion in this case. That opinion is The State v. Thomas James Chance, ____S.C.____, 405 S.E.2d 375 (1991) and is reproduced in Petitioner's Appendix.

STATUTE INVOLVED

Driving under the influence, proscribed by S.C. Code Ann. § 56-5-2930 (1991), is punished pursuant to S.C. Code Ann. § 56-5-2940 (1991). The specific punishment provisions for first and second offenses, are, in part, as follows:

> A person violating a provision of Section 56-5-2930, upon conviction, entry of a plea of guilty or of nolo contendere or forfeiture of bail, must be punished in accordance with the following:
>
> > (1) By a fine of two hundred dollars or imprisonment for not less than forty-eight hours nor more than thirty days, for the first offense. However, in lieu of the forty-eight hour minimum imprisonment the court may provide for forty-eight hours of public service employment. The minimum forty-eight hour imprisonment or public service employment must be served at a time when the person is off from work and does not interfere with his

> regular employment under terms and conditions as the court considers proper. However, the court may not compel an offender to perform public service employment in lieu of the minimum sentence.
>
> (2) By a fine of not less than two thousand dollars nor more than five thousand dollars and imprisonment for not less than forty-eight hours nor more than one year for the second offense. However, the fine imposed by this item may not be suspended in an amount less than one thousand dollars. In lieu of service of imprisonment the court may require that the individual complete an appropriate term of public service employment of not less than ten days upon terms and conditions the court considers proper.

S.C. Code Ann. § 56-5-2940 (1) and (2) (1991).

STATEMENT OF THE CASE

While legally under the influence of alcohol, Petitioner apparently lost control of his vehicle, travelled down an embankment, and struck a utility pole. (Tr. p. 17). The incident resulted in the present, second offense of driving under the influence.

Petitioner's prior, first offense of driving under the influence was adjudicated in magistrate's court in 1980 through a guilty plea. Petitioner's counsel acknowledges that Petitioner did not have the right to appointed counsel for his first offense of driving under the influence. Petitioner also acknowledges that he did not request a lawyer when he entered the guilty plea. Similarly, Petitioner makes no claim he was deprived of counsel or did not know that he could have elected to retain counsel. Petitioner only contends that because he did not have an attorney present

when he pled guilty to first offense driving under the influence, his prior offense in 1980 cannot enhance the present offense to driving under the influence, second offense. (Tr. pp. 1-3, 11, 13-14).

Petitioner's contention is without support in the law of both the State of South Carolina and federal constitutional authority. Contrary to Petitioner's argument based upon Baldasar v. Illinois, 446 U.S. 222, 100 S.Ct. 1585, 64 L.Ed.2d 169 (1980), the trial judge properly considered Petitioner's 1980 conviction as a prior offense and sentenced him as a second time driving under the offense offender pursuant to S.C. Code Ann. § 56-5-2940 (1991). The judgment of the trial court was correctly affirmed by the Supreme Court of South Carolina consistent with both public policy and the Court's prior decisions.

SUMMARY OF ARGUMENT

Scott v. Illinois, 440 U.S. 367, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979) held that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not actually incarcerated. The South Carolina Supreme Court adopted a bright line rule and concluded that an uncounseled conviction constitutionally valid under Scott is valid for all purposes and may be used to increase the term of imprisonment for a subsequent offense under an enhanced penalty statute. The State court's holding recognizes the distinct validity of a prior uncounseled misdemeanor for which the defendant was not actually incarcerated and correctly and consistently applies this principle.

REASON WHY THE PETITION SHOULD BE DENIED

The Supreme Court of South Carolina recognizes and applies the Court's decision in Scott v. Illinois, constitutionally and consistently, to recividist offenses.

Actual imprisonment is the line defining the constitutional right to appointment of counsel. Scott v. Illinois, supra. "[T]he Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the State has afforded him the right to assistance of appointed counsel in his defense." Id.

The basis of Petitioner's present complaint is the per curiam opinion Baldasar, supra, which consists of three concurring opinions and one dissenting opinion. In Baldasar the Court reviewed Illinois law which provided that theft "not from the person" of property worth less than One Hundred Fifty ($150) Dollars was a misdemeanor punishable by not more than a

year of imprisonment and a fine of not over One Thousand ($1,000) Dollars. A second, subsequent conviction for the same offense carried an enhanced felony punishment of a prison term of one (1) to three (3) years. Baldasar was not represented by counsel and did not formally waive any right to counsel. He was not imprisoned as a result of his first conviction. At the time of his second conviction, Baldasar was represented by counsel and sentenced to prison for one (1) to three (3) years under the statutory sentencing enhancement provision. Baldasar, 447 U.S. at 222-223.

A majority of the United States Supreme Court held that the uncounseled first offense -- while valid under Scott v. Illinois because it had not resulted in actual imprisonment -- was not valid for all purposes and could not be used under the enhanced penalty statute to impose an increased term of imprisonment for a

subsequent conviction. Only the disposition -- not any supporting rationale for the disposition -- was agreed upon by a majority of the Court.

In Baldasar four (4) Justices held that an uncounseled conviction -- which itself was invalid for imposing imprisonment -- could never be used to increase a term of imprisonment for a subsequent conviction under a statutory enhancement provision. (Stewart, J., concurring, joined by Brennan and Stevens, JJ.; Marshall, J., concurring, joined by Brennan and Stevens, JJ.). A fifth Justice, Mr. Justice Blackmun, concurred in the result solely on the basis that Baldasar's first offense had been for a crime punishable for more than six (6) months imprisonment. Mr. Justice Blackmun restated a portion of his dissent in Scott v. Illinois expressing his belief that an indigent defendant in a state criminal case should be afforded counsel if an offense

actually subjects him to imprisonment or if he is prosecuted for a non-petty criminal offense, one punishable by more than six (6) months imprisonment. (Blackmun, J., concurring). Four (4) Justices noted 1) under Scott v. Illinois "actual imprisonment [is] the line defining the constitutional right to appointment of counsel[,]" 2) repeat offender laws penalize the last offense, 3) the majority's creation of a hybrid offense -- constitutionally valid in one instance and not in another -- could only create burdensome confusion, and held that an uncounseled conviction, for which no actual imprisonment is imposed, is constitutionally valid and available for sentence enhancement. (Powell, J., dissenting, joined by Burger, C.J., and White and Rehnquist, JJ.).

Courts attempting to apply Baldasar have reached different conclusions concerning its meaning. Moore v. Georgia,

484 U.S. 904, 108 S.Ct. 247, 98 L.Ed.2d 204 (1987) (petition for writ of certiorari denied; White, J., dissenting). It has also been held that "[t]he Court in Baldasar divided in such a way that no rule can be said to have resulted." United States v. Robles-Sandoval, 637 F.2d 692 n.1 (9th Cir. 1981).

The rule enunciated by the Supreme Court of South Carolina in Chance applies the rule of Scott v. Illinois, that an uncounseled misdemeanor conviction is constitutionally valid if the offender is not actually incarcerated. The Supreme Court of South Carolina has adopted a logical bright line rule for applying this precedent to the sentencing of recidivist offenders.

> [W]e conclude an uncounseled conviction constitutionally valid under Scott is valid for all purposes and therefore may be used to increase the term of imprisonment for a

> subsequent offense under an enhanced penalty statute. Accordingly, we hold when a defendant was not actually incarcerated for a prior uncounseled misdemeanor, that offense may be used for enhancement.

State v. Chance, supra. The rule avoids the anomaly of a constitutionally valid conviction that may not be subsequently used for the purpose of recidivist sentencing. The Supreme Court of South Carolina has followed and applied the Court's precedent in Scott v. Illinois, and its bright line rule is not barred by Baldasar. The petition for certiorari should be denied since the case was correctly decided and is consistent with both public policy and the Court's prior decisions.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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Supreme Court, U.S.
FILED
JAN 28 1992
OFFICE OF THE CLERK

(3)

No. 91-540

In the Supreme Court of the United States

OCTOBER TERM, 1991

THOMAS JAMES CHANCE, PETITIONER

v.

STATE OF SOUTH CAROLINA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether a valid uncounseled misdemeanor conviction may be treated as a prior offense for purposes of sentencing a recidivist offender.

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In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. On June 18, 1989, petitioner drove his car down an embankment and struck a utility pole. He was arrested and charged with driving under the influence of alcohol (DUI). Tr. 17, 19.[1] In March 1980, he had pleaded guilty to a similar offense in a South Carolina magistrates court; he was not represented

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[1] "Tr." refers to the Transcript of Record filed in the South Carolina Supreme Court.

by counsel at that time, nor was he incarcerated for that offense. Tr. 3, 11, 14; Pet. App. C.

South Carolina law, S.C. Code Ann. § 56-5-2940 (Law. Co-op. 1991), provides for enhanced punishment for a second DUI offense. A first offense is punishable by a fine of $200 or imprisonment for not less than 48 hours nor more than 30 days; the minimum term of imprisonment may be suspended, and 48 hours of community service imposed in its place. A second offense is punishable by a fine of not less than $2,000 nor more than $5,000 and imprisonment for not less than 48 hours nor more than one year; $1,000 of the minimum fine and the term of imprisonment may be suspended, and not less than ten days' community service imposed in lieu of imprisonment.

2. When petitioner appeared before the trial court on his second DUI offense, he did not contest his guilt. Instead, he argued that he should be considered a first offender because his first DUI conviction was uncounseled and so could not be used for sentencing enhancement under *Baldasar* v. *Illinois*, 446 U.S. 222 (1980). Tr. 2, 16-17. Petitioner has never claimed that he was indigent, and he does not assert any right under state or federal law to the appointment of counsel.[2] Nor does he claim that he was unaware when he pleaded guilty to his first offense that he had the right to retain counsel, or that he sought to exercise that right. His claim, here and in the courts below, is simply that he did not expressly waive representation by counsel and that, in the absence of any indication on the record that he was told that he could appear with counsel, his plea of guilty without the assistance of counsel

[2] Petitioner does not appear in forma pauperis in this Court, and the record does not indicate whether his counsel in the courts below was retained or appointed.

did not constitute an adequate implicit waiver. Tr. 12-14; Pet. S.C. Sup. Ct. Br. 3; Pet. 3.

The trial court ruled that the fact that petitioner had voluntarily appeared before the magistrate in his first DUI prosecution and entered a guilty plea without requesting counsel constituted a waiver of his right to counsel.[3] Tr. 15-16. As a consequence of that ruling, the trial court considered the instant DUI offense as a second offense for sentencing purposes without finding it necessary to rule on petitioner's *Baldasar* claim—*i.e.*, that an uncounseled misdemeanor conviction absent waiver of counsel cannot be used for sentencing enhancement.

Petitioner was sentenced to a $2,000 fine and one year's imprisonment, with $1,000 of the fine and all but two days of imprisonment suspended in favor of one year's probation. In addition, the court gave petitioner credit for the three days he had been jailed following his arrest. Tr. 19, 20. Thus, petitioner did not serve any term of imprisonment as a consequence of his DUI conviction. Petitioner has successfully completed his probationary period.

3. The Supreme Court of South Carolina affirmed petitioner's conviction and sentence. Pet. App. 1-4. It rejected petitioner's claim that *Baldasar* precluded consideration of his first DUI offense in the deter-

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[3] In South Carolina, a defendant need not appear at trial to be convicted of a first DUI offense. If he forfeits bond on such a charge, that will result in a conviction and an implied waiver of the right to counsel for purposes of using the uncounseled misdemeanor conviction to enhance the sentence for a subsequent offense. *South Carolina* v. *Smith*, 276 S.C. 494, 280 S.E.2d 200 (1981). The trial court reasoned that petitioner's voluntary appearance and plea of guilty likewise represented an implied waiver of the right to counsel. See Tr. 12-16.

mination of his sentence for the instant offense.[4] The court noted that this Court in *Baldasar* was evenly divided as to the effect of a prior valid uncounseled conviction on a subsequent offense under an enhanced penalty statute, with the deciding vote for reversal "cast on a different ground"—*i.e.*, the invalidity of the prior conviction. Pet. App. 2. The state court nevertheless observed that "a logical application" of this Court's decisions supports the conclusion that "an uncounselled conviction constitutionally valid under *Scott* [v. *Illinois*, 440 U.S. 367 (1979)] is valid for all purposes and therefore may be used to increase the term of imprisonment for a subsequent offense under an enhanced penalty statute." Pet. App. 3.[5]

DISCUSSION

The Supreme Court of South Carolina correctly concluded that *Baldasar* does not forbid the use of petitioner's uncounseled misdemeanor conviction to enhance the penalty for his subsequent offense. In dissenting from the denial of certiorari in *Moore* v. *Georgia*, 484 U.S. 904, 905 (1987), Justice White observed that "[p]ossibly because this Court was sharply divided in *Baldasar*, with no opinion for reversal gaining more than three votes, courts attempting to apply that decision have come to different con-

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[4] The court apparently accepted petitioner's position on the waiver issue, stating without amplification that "[petitioner] was not represented by counsel at the 1980 plea nor does the record before us indicate [petitioner] waived his right to counsel." Pet. App. 2.

[5] Justice Finney dissented. In his view, "a prior uncounselled conviction which did not result in incarceration may not be used to increase punishment under an enhanced penalty statute." Pet. App. 3.

clusions concerning its meaning." That observation remains correct. Nevertheless, this Court denied certiorari in *Moore*, where the issue was not cleanly presented. Although the confusion among the state courts regarding the use of uncounseled misdemeanor convictions to enhance penalties for subsequent offenses may merit resolution by this Court in an appropriate case, this case, like *Moore*, is not a suitable vehicle for that purpose. We accordingly suggest that certiorari should be denied.

1. In *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), this Court held that a State may not constitutionally imprison an indigent defendant for a petty offense unless he has been offered appointed counsel at his trial. In *Scott* v. *Illinois*, 440 U.S. 367 (1979), the Court refused to extend the holding in *Argersinger* to require an offer of counsel in all cases in which imprisonment is statutorily authorized. The Court explained (440 U.S. at 373):

> Even were the matter *res nova*, we believe that the central premise of *Argersinger*—that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment—is eminently sound and warrants adoption of actual imprisonment as the line defining the constitutional right to appointment of counsel. *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States.

In *Baldasar* v. *Illinois*, *supra*, the question presented was whether a constitutionally valid, but uncounseled, misdemeanor conviction "may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term."

446 U.S. at 222. Baldasar, who was indigent, had not been represented by a lawyer and did not formally waive counsel when he was convicted of his first offense of misdemeanor theft. Nonetheless, that first conviction was valid under *Scott* because Baldasar was not imprisoned for the offense. When that first offense was considered in determining the applicable punishment for Baldasar's second theft offense, the second offense was converted from a misdemeanor not requiring imprisonment to a felony carrying a sentence of one to three years' imprisonment. 446 U.S. at 223.

The per curiam opinion in *Baldasar* reversed the state court judgment affirming Baldasar's conviction and remanded for further proceedings; instead of providing a rationale for that result, the per curiam opinion referred to "the reasons stated in the concurring opinions." 446 U.S. at 224. Justice Stewart, joined by Justices Brennan and Stevens, concurred in the result for the reason that "the indigent prisoner, after his conviction of petit larceny, was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." *Ibid.* Justice Marshall, with whom Justices Brennan and Stevens also joined, concurred in the result on the ground that "a conviction that is invalid for purposes of imposing a sentence of imprisonment for the offense itself remains invalid for purposes of increasing a term of imprisonment for a subsequent conviction under a repeat-offender statute." *Id.* at 228. Justice Blackmun concurred in the result, concluding that Baldasar's first conviction was invalid because he had been prosecuted for an offense punishable by more than six months' imprisonment. Justice Blackmun maintained the view (rejected by

the Court in *Scott*) that the potential punishment, not the actual sentence, determined whether Baldasar had the right to appointed counsel. Because Justice Blackmun considered Baldasar's first conviction constitutionally invalid, he reasoned that it could not be used to support enhancement. 446 U.S. at 230. In dissent, Justice Powell, joined by Chief Justice Burger and Justices White and Rehnquist, reasoned that Baldasar was being imprisoned for his second offense, not for his uncounseled first offense, and that a "*valid* misdemeanor conviction * * * should be available to enhance petitioner's sentence." *Id.* at 233.

The Supreme Court of South Carolina was correct in concluding that *Baldasar* failed to resolve the question presented in this case—whether a valid uncounseled misdemeanor conviction may be used under an enhanced penalty statute to impose greater penalties for a subsequent misdemeanor. In *Marks* v. *United States*, 430 U.S. 188, 193 (1977), this Court held that when no opinion in one of its decisions commands the support of a majority of the Justices, the holding of the Court is the position taken by the Justice or Justices who based their acquiescence in the decision on the narrowest grounds. In *Baldasar*, that rule refers us to the concurring opinion of Justice Blackmun, who based his agreement with the result on the reasoning that a constitutionally invalid prior conviction could not be used to enhance punishment for a subsequent offense. Justice Blackmun did not reach or decide the question whether a constitutionally valid uncounseled first conviction could be used for enhancement. Thus, the Court split 4-4 on that question and left it unresolved.

We agree with the reasoning expressed by Justice Powell for four members of the Court in *Baldasar*,

in which he concluded that a valid uncounseled misdemeanor conviction could properly be used to enhance the penalty for a subsequent offense. In such cases, the defendant is being punished by imprisonment for his second offense, not for his first offense. The theory of enhanced punishment is that commission of the second offense after a valid conviction for a first offense shows that the defendant has ignored the explicit warning provided by his first conviction that such conduct is prohibited. Although an uncounseled conviction is not a sufficiently accurate determination of guilt to permit the deprivation of liberty, it is sufficiently accurate to permit other kinds of punishment, such as a fine or enforced community service. See *Scott* v. *Illinois*, *supra*. *A fortiori*, such a conviction may serve as a valid warning that the defendant should avoid *future* unlawful conduct, and a State may legitimately impose enhanced penalties when the defendant ignores that warning. Cf. *Lewis* v. *United States*, 445 U.S. 55, 67 (1980) (use of constitutionally invalid uncounseled felony conviction is constitutionally sufficient basis for imposition of criminally enforceable firearms disability); *Schindler* v. *Clerk of Circuit Court*, 715 F.2d 341, 345-346 (7th Cir. 1983) (applying *Lewis* analysis to uphold a State's enhanced penalty scheme for drunk driving offenses against a *Baldasar*-based challenge).

2. In the federal system, an indigent defendant need not be offered appointed counsel when he is tried for an offense for which his potential imprisonment is not more than six months, as long as he is not actually sentenced to imprisonment upon conviction. See 18 U.S.C. 3006A(a)(1)(a), 3581(b)(7); *Scott* v. *Illinois*, *supra*. A number of federal statutes provide that a first offense is a misdemeanor that would not

require the appointment of counsel if there is no sentence of imprisonment, but a second or subsequent offense may result in enhanced imprisonment. See 8 U.S.C. 1325 (illegal entry into United States by an alien); 15 U.S.C. 1264(a) (shipment of misbranded or banned hazardous substances); 25 U.S.C. 202 (inducing an Indian to purport to convey title held by the United States in trust for him). Moreover, the enforcement in federal courts of state law under the Assimilative Crimes Act, 18 U.S.C. 13, has the potential for invoking state recidivist sentencing provisions. We have not discovered any reported federal decision under any of these statutes in which *Baldasar* has been held to prohibit the enhancement of a sentence based on a valid but uncounseled prior conviction. To be sure, in cases arising under the federal Sentencing Guidelines, courts have expressed some disagreement as to the scope of *Baldasar*. So far, however, that disagreement has not resulted in a square conflict among the circuits.[6] Accordingly, the

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[6] The Sentencing Guidelines require the inclusion of certain uncounseled misdemeanor convictions in the calculation of a defendant's criminal history. See Sentencing Guidelines §§ 4A1.1(c), 4A1.2(c), (d) and (e); *id.* § 4A1.2, Application Note 6 & Background. Such prior offenses could raise a defendant's criminal history score by up to four points, see § 4A1.1(c), and thus could increase his criminal history category by up to two levels, which in turn could result in an enhanced sentencing range. The Fifth Circuit has upheld the use of prior uncounseled misdemeanor convictions, valid under *Scott*, to increase the defendant's criminal history score where the resulting sentence was four months longer than the maximum sentence that would have been permissible if the misdemeanor convictions had not been counted. *United States* v. *Eckford*, 910 F.2d 216 (5th Cir. 1990). See also *United States* v. *Peagler*, 847 F.2d 756, 757-758 (11th Cir. 1988) (upholding use of valid uncounseled misdemeanor convictions

federal court decisions do not suggest that there is any pressing need at this time for this Court to revisit or clarify the scope of the *Baldasar* rule.

3. While the federal courts are not squarely in conflict over the scope of *Baldasar*, the state courts have reached sharply differing conclusions in attempting to apply *Baldasar* and the precedents on which it is based. Some state courts have read *Baldasar* broadly to prohibit the use of any prior uncounseled misdemeanor conviction to impose a term of imprisonment following a second conviction.[7] Others have read

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in sentencing for subsequent offense); *Moore* v. *Jarvis*, 885 F.2d 1565 (11th Cir. 1989) (no *Baldasar* claim can be made out where non-indigent defendant voluntarily pleaded *nolo contendere* or guilty to prior offense without retaining counsel). The Ninth Circuit, however, in *United States* v. *Brady*, 928 F.2d 844, 852-854 (9th Cir. 1991), held, as an alternative basis for its judgment, that it was impermissible to depart upward from a Guidelines sentence based on uncounseled misdemeandor tribal court convictions. The tribal court sentences involved in that case were invalid under *Scott* because they were fine-or-imprisonment sentences. Nonetheless, the court of appeals, in dictum, expressed agreement with Justice Marshall's position in *Baldasar* that any uncounseled misdemeanor conviction could not properly be used to increase a term of imprisonment imposed following a subsequent conviction.

[7] See, e.g., *Pananen* v. *State*, 711 P.2d 528, 531 (Alaska Ct. App. 1985); *Lovell* v. *State*, 283 Ark. 425, 428, 678 S.W.2d 318, 320 (1984); *State* v. *Vares*, 71 Haw. 617, 621, 801 P.2d 555, 557 (1990); *State* v. *Cooper*, 343 N.W.2d 485, 486 (Iowa 1984); *State* v. *Oehm*, 9 Kan. App. 2d 399, 401-403, 680 P.2d 309, 311-312 (1984); *State* v. *Dowd*, 478 A.2d 671, 678 (Me. 1984) (relying in part on state constitutional law); *State* v. *Ulibarri*, 96 N.M. 511, 512-513, 632 P.2d 746, 747 (1981); *City of Pendleton* v. *Standerfer*, 297 Or. 725, 729, 688 P.2d 68, 70 (1984); *Sargent* v. *Commonwealth*, 360 S.E.2d 895,

Baldasar more narrowly, to bar an enhanced penalty only if the enhanced term is greater than the term that could have been imposed for a first offense.[8] Still others have read *Baldasar* to be limited by Justice Blackmun's concurrence and therefore not to bar the enhancement use of prior convictions for misdemeanors for which the defendant was exposed to no more than a six-month term of imprisonment.[9] And one court has regarded *Baldasar* as not establishing *any* rule barring the enhancement use of valid, uncounseled convictions.[10]

4. In light of the disagreement among the state courts as to the permissible use of valid uncounseled misdemeanor convictions, we agree with petitioner that the issue is one that may well justify review by this Court in an appropriate case. We disagree, however, with petitioner's contention that this case is an appropriate vehicle for review by this Court. For several reasons, this case does not cleanly present the questions that have been left unresolved in the wake of *Baldasar*.

First, petitioner was not subjected to an enhanced term of imprisonment on account of his prior un-

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899-901 (Va. Ct. App. 1987); *State* v. *Armstrong*, 332 S.E.2d 837, 841 (W. Va. 1985).

[8] See *Moore* v. *State*, 181 Ga. App. 548, 549, 352 S.E.2d 821, 822, cert. denied, 484 U.S. 904 (1987); *State* v. *Laurick*, 120 N.J. 1, 16, 575 A.2d 1340, 1347 (1990).

[9] See, *e.g.*, *Hlad* v. *State*, 565 So. 2d 762, 764-766 (Fla. Dist. Ct. App. 1990); *State* v. *Orr*, 375 N.W.2d 171, 175-176 (N.D. 1985); *Commonwealth* v. *Thomas*, 510 Pa. 106, 112-114, 507 A.2d 57, 60-61 (1986); *State* v. *Novak*, 107 Wis. 2d 31, 35-40, 318 N.W.2d 364, 368-369 (1982).

[10] See *Sheffield* v. *City of Pass Christian*, 556 So. 2d 1052, 1053 (Miss. 1990).

counseled misdemeanor conviction. After his second conviction, he was given the statutory minimum sentence of 48 hours' imprisonment. That minimum term of imprisonment was the same as the minimum term to which petitioner would have been subjected if this had been his first DUI conviction. Moreover, the court at the time of sentencing treated petitioner's 48-hour sentence as fully satisfied as a result of the three days petitioner had already spent in pretrial detention. Thus, unlike the situation in *Baldasar*, petitioner did not suffer any imprisonment as a result of an enhancement based on his first, uncounseled conviction.[11] Accordingly, this case does not squarely present the question whether a term of imprisonment can be imposed because of a prior uncounseled conviction.[12]

This case differs from *Baldasar* in another important respect. The Illinois statutory scheme under which Baldasar was sentenced imposed mandatory imprisonment for the second offense but not for the

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[11] Also, in this case—in contrast to *Baldasar*—the second offense was not converted from a misdemeanor to a felony, subjecting petitioner to the collateral consequences of a felony conviction. Both a first and a second offense under the South Carolina penalty scheme are misdemeanors. See *Berry* v. *State*, 561 N.E.2d 832, 840 (Ind. Ct. App. 1990) (holding that valid uncounseled misdemeanor conviction could be considered in sentencing; distinguishing *Baldasar* on ground that in that case the offense level was enhanced).

[12] It is true that petitioner received a greater fine than he would have received for a first offense: a $1,000 fine was imposed, whereas a $200 fine was the maximum for a first offense. But *Argersinger* and *Scott* hold that the Constitution permits a fine to be imposed on an uncounseled defendant. It follows that the Constitution also permits the enhancement of a fine on the basis of an uncounseled first offense.

first. Thus, as Justice Stewart, joined by Justices Brennan and Stevens, characterized the situation, Baldasar was "sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution" (446 U.S. at 224). The South Carolina statutory scheme involved in this case permits the suspension of all imprisonment in lieu of community service for both a first and a second offense. The sentencing judge retains absolute discretion to determine whether the offender requires imprisonment as punishment for his second offense; the offender will not be imprisoned only and inevitably because of his prior uncounseled conviction.[13] Thus, even if the South Carolina statute is considered on its face, rather than as applied, the question left unresolved in *Baldasar* is not squarely presented here.

Finally, although *Argersinger*, *Scott*, and *Baldasar* all involved the right of an indigent defendant to appointed counsel, the record in this case does not indicate that petitioner has ever claimed to be indigent. Instead, his claim appears to be simply that, absent an express, on-the-record waiver of counsel in the prior case, his uncounseled conviction may not be used for enhancement of his penalty at the time of his subsequent conviction. That claim raises the issue—not presented in *Baldasar* or its precedents—of when a waiver of counsel is to be presumed from a record that is silent not only as to the issue of waiver, but also as to the antecedent issue of indigency. See *Kitchens* v. *Smith*, 401 U.S. 847, 848 (1971) (on col-

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[13] Cf. *Moore* v. *State*, 181 Ga. App. at 549, 352 S.E.2d at 822 (Georgia statute is not an enhanced penalty statute, because penalty to be imposed for both first and second offenses remains within the discretion of sentencing court), cert. denied, 484 U.S. 904 (1987).

lateral attack on a conviction for escape by asserting invalidity of original conviction, "to establish his right to appointed counsel [on original conviction] petitioner had the burden of proving his inability at that time to hire an attorney").

The courts below reached differing conclusions on the waiver issue. Applying South Carolina law, the trial court held that when petitioner pleaded guilty to his first offense without requesting the assistance of counsel, that constituted a waiver of his Sixth Amendment right to be represented by counsel. Tr. 15. The Supreme Court of South Carolina asserted that the *Baldasar* question was preserved when the record did not show that petitioner had affirmatively waived the right to counsel. Pet. App. 2a. Neither court, however, expressly addressed the relevance of the lack of any showing—or indeed any claim—that petitioner was indigent at the time of his first conviction.

This Court has never addressed the question whether waiver of the right to counsel may be implied by a voluntary guilty plea, where there is no claim that the defendant was prevented by the State, by his indigence, or by his ignorance from exercising his right to be represented by counsel. See *Moore* v. *Jarvis*, 885 F.2d 1565 (11th Cir. 1989) (no *Baldasar* claim can be asserted by a non-indigent defendant who pleaded *nolo contendere* and guilty to prior misdemeanors without counsel unless there is a showing that some state action prevented the defendant from retaining counsel); *People* v. *Cooper*, 204 Ill. App. 3d 1035, 562 N.E.2d 1171 (1990) (burden is on defendant to show indigency at time of first offense as predicate for *Baldasar* claim); *State* v. *Novak*, 107 Wis. 2d 31, 40 & n.5, 318 N.W.2d 364, 369 & n.5 (1982) (same). Because that preliminary issue remains unresolved in this case, as well as for the other

reasons we have discussed, we do not believe this case is a suitable vehicle for the Court to address the issue left unresolved in *Baldasar*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 312324 45282